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NO. 05-1657

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON,

Petitioner,

v.

WASHINGTON EDUCATION ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WASHINGTON

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. Respondent's Restatement Of The Question Presented Does Not Accurately State The Issue

Respondent Washington Education Association's (WEA) Brief In Opposition restates the Question Presented. According to the WEA, the question is whether

> "Wash. Rev. Code § 42.17.760 impermissibly burdens the First Amendment right of unions and their members to free speech by creating an insurmountable hurdle to engaging in political speech that is not narrowly tailored to advancing any compelling governmental interest?" Br. Opp'n at i (punctuation omitted).

In its Question Presented, and elsewhere, the WEA describes this "insurmountable hurdle" as prohibiting the use of members dues in the union's general fund "unless the union has secured the affirmative consent of each individual payer of an agency fee to the financing of the union's political advocacy through the union's treasury moneys". Br. Opp'n at i, 9, 12, 17.

This characterization of the insurmountable hurdle is not accurate. Wash. Rev. Code § 42.17.760 does not impose any limit on the union's use of members' dues. It applies only to the union's use of nonmembers' agency fees. Wash. Rev. Code § 42.17.760 provides:

> "A labor organization *may not use agency shop fees* paid by an individual who is *not a member* of the organization to make

> contributions or expenditures to influence an election or to operate a political committee, *unless affirmatively authorized by the individual.*" Wash. Rev. Code § 42.17.760 (emphasis added).

By the plain text of the statute, the WEA does not need nonmembers' consent to use members' dues for political purposes. It needs nonmembers' consent to use nonmembers' fees for political purposes.

This fact is also confirmed by the Permanent Injunction entered by the trial court. It does not require nonmembers' consent before the WEA can use its general fund for political purposes. Rather, it requires the WEA to reduce the amount of the agency fees paid by nonmembers by the percentage of the WEA's expenditures that have been used for political purposes. Pet. App. 88a (¶ 2(e)).

Thus, the issue in this case is not how a union may use members' dues, it is how a union may use nonmembers' fees. The first amendment to the United States Constitution prohibits the state "from requiring [a nonmember] to contribute to the support of an ideological cause he may oppose as a condition of holding a job . . . ." *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977). In *Chicago Teacher's Union, Local 1 v. Hudson*, 475 U.S. 292, 310 (1986), the Court held that the nonmembers' First Amendment rights were protected if the nonmembers were given an opportunity to object (opt-out) to having their fees used for political purposes. However, this Court has explained that *Hudson*

> "outlined a *minimum set of procedures* by which a union in an agency-shop relationship could meet its requirement under *Abood*, [431 U.S. 209.]" *Keller v. State Bar of California*, 496 U.S. 1, 17 (1990) (emphasis added).

This case directly presents the question of whether a state may go beyond the minimum procedures authorized by *Hudson* and require that nonmembers affirmatively consent (opt-in) before their fees may be used to support the union's political agenda. This is an important question that should be resolved by this Court.

2. Respondent Offers No Authority That Unions Have A First Amendment Right To Use Nonmembers' Fees For Political Purposes

The decision of the Washington Supreme Court majority below is based on the premise that the "United States Supreme Court has held that a union has the right to use nondissenting nonmember fees for political purposes". App. at 26a. In our petition we stated that we were unaware of any decision of this Court that recognizes such a constitutional right. Pet. at 17. In *Lincoln Federal Labor Union 19129 v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 531 (1949), the Court held that unions do not have a First Amendment right to require nonmembers to pay fees to a union as a condition of employment. Thus, a union's ability to collect fees from nonmembers is solely a creature of statute—not constitutional law.

In response, the WEA agrees that *Lincoln Federal Labor Union* stands for the proposition that

a union has no constitutional right to collect an agency fee in the first place. Br. Opp'n at 13. However, the WEA argues that *Lincoln Federal Labor Union* does not address the union's right to engage in political expression financed by nonmember fees that the union has lawfully collected. Br. Opp'n at 13.

However, the argument does not support the underlying premise of the Washington Supreme Court—that the union has a constitutional right to use nonmembers' fees for political purposes. The WEA cites no decision of this Court to support this proposition. The decision below is so far outside the mainstream of this Court's decisions that it requires correction.

3. The Decision Below Is In Conflict With Other Decisions That Uphold Opt-In Requirements For Contributions To Unions For Political Purposes

In our petition, we argued that the decision below striking down the opt-in requirement of Wash. Rev. Code § 42.17.760 is in conflict with *Federal Election Commission v. National Right To Work Committee*, 459 U.S. 197 (1982) (*NRWC*), *United States v. Boyle*, 482 F.2d 755 (D.C. Cir. 1973), and *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997). All three of these decisions upheld statutes that established opt-in procedures to make contributions that a union can use for political purposes. Pet. at 20–27.

The WEA seeks to minimize these conflicts. With regard to *NRWC* and *Boyle*, the WEA emphasizes that the statutes involved in those cases

applied to contributions to unions that would be used to support candidates for office rather than to support or oppose ballot measures. Br. Opp'n at 16–18. The WEA states that none of the political contributions at issue in this case were used to support candidates for public office. Br. Opp'n at 5 n.5.

This fact does not eliminate the conflict. Wash. Rev. Code § 42.17.760 requires affirmative consent to use fees to influence an election or operate a political committee. This requirement applies to both elections for public office and ballot measures. And the decision below did not strike down Wash. Rev. Code § 42.17.760 only as applied to ballot measures. There is nothing in the opinion of the majority below that draws this distinction. Wash. Rev. Code § 42.17.760 applies to fees paid to a union that could be used to contribute to a candidate. The decision below striking down the opt-in requirement conflicts with *NRWC* and *Boyle*.

Moreover, the WEA's emphasis on the distinction between election for public office and elections for ballot measures does not minimize the conflict. The WEA relies heavily on *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which struck down a law that prohibited corporations from making contributions or expenditures to influence the outcome of elections on certain ballot measures. Br. Opp'n at 10, 16, 18. Based on *Bellotti*, the WEA appears to be arguing that there is no conflict between the decision below and *NRWC* and *Boyle* because a union has a greater right to use nonmembers' fees to support or oppose a ballot measure than it does to support or oppose a

candidate for public office. The WEA cites no authority to support this proposition or offer any logical reason why opt-in is permissible if the contribution is to a candidate but impermissible if it is to support or oppose a ballot measure.

The WEA also seeks to minimize the conflict between the decision below and *Miller*. The WEA does not rely on the distinction between elections for public office and ballot measures because the Michigan Constitution guarantees the right of initiative and referendum. Mich. Const. art. II, § 9. Thus, the opt-in requirement in *Miller* applied to both candidate elections and ballot measures. Instead, the WEA argues that the requirement in *Miller* only limited the union's ability to use the state's payroll services to assist it in collecting contributions. Br. Opp'n at 14.

This characterization of *Miller* is not accurate. The statute in *Miller* provided that a union

> "may solicit or obtain contributions for a separate segregated fund . . . on *an automatic basis, including but not limited to a payroll deduction plan*, only if the individual who is contributing to the fund affirmatively consents to the contribution at least once in every calendar year". *Miller*, 103 F.3d at 1248–49 (emphasis added).

The prohibition was not limited to use of the state's payroll services. It applied more broadly to contributions "on *an automatic basis, including but not limited to a payroll deduction plan*". *Id.*

The decision below struck down an opt-in requirement. *NRWC*, *Boyle*, and *Miller* upheld opt-in requirements. This is a direct conflict that should be resolved by this Court.

4. Wash. Rev. Code § 42.17.760 Is Not Unique

The WEA argues that this case does not have national significance because the requirement in Wash. Rev. Code § 42.17.760 is unique. Br. Opp'n at 11. However, as the Campaign Legal Center explains in its amicus brief, a number of states have adopted opt-in requirements for political contributions. Amicus Curiae Br. Campaign Legal Center at 12–13, App. 1–5. Thus, the validity of opt-in requirements is not limited to Washington. It is a national issue, and the validity of such requirements should be resolved by this Court.

5. Conclusion

For the foregoing reasons, the Petition For A Writ Of Certiorari should be granted.

Respectfully submitted.

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